

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CASEY JOE MATEOS,

Defendant-Appellant.

UNPUBLISHED

April 16, 2015

No. 320178

Bay Circuit Court

LC No. 13-010055-FC

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(ii) (related by blood or affinity), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(b)(ii) (related by blood or affinity). He was sentenced to prison terms of 210 to 600 months on the CSC I counts and 120 to 180 months on the CSC II count. We affirm.

I. FACTS

The victim testified that defendant, her father, improperly touched her breasts and vagina. The victim relayed two specific instances when defendant digitally penetrated her vagina: once in a bedroom and once on a couch. The victim was between 13 and 14 years old when the offenses occurred. In a recorded police interview, defendant initially denied any sexual contact with the victim; however, he later admitted that he digitally penetrated the victim 8 to 10 times. Defendant also admitted to touching the victim's breast.

II. JURY INSTRUCTIONS

Predicated on the evidence that defendant digitally penetrated the victim 8 to 10 times, defendant argues that the trial court's jury instructions effectively amended the information to include a multitude of uncharged acts and violated his right to a unanimous verdict because the court did not specify which of the alleged acts the charges were based upon. These issues were not preserved below. We review unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Due process dictates that a jury may not convict a defendant of a crime not charged in the information because the accused must be given notice of the charges brought and an adequate

opportunity to prepare a defense. *Turner v New York*, 386 US 773, 775; 87 S Ct 1417; 18 L Ed 2d 522 (1967); *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993). In this case, the information charged defendant with three counts. Counts 1 and 2 alleged that defendant “engage[d] in sexual penetration to-wit: finger in labia majora” of the victim, which constituted CSC I because of their relationship. Count 3 alleged that defendant had “sexual contact” with the victim. The court stated that defendant was charged with three separate crimes, and instructed the jury on the elements of each offense. These instructions were consistent with the crimes charged in the information. Accordingly, the record does not support defendant’s assertion that the court amended the information when instructing the jury.

Defendant alternatively asserts that he was denied the right to a unanimous verdict. In a federal criminal proceeding, the Sixth Amendment prevents a jury from convicting a defendant unless the jury unanimously finds that the government has proven each element of a charged crime. *Richardson v United States*, 526 US 813, 817; 119 S Ct 1707; 143 L Ed 2d 985 (1999). In noncapital state criminal trials, the Fourteenth Amendment does not require unanimous verdicts, and any unanimity right arises only under state law. *McDonald v Chicago*, 561 US 742, 766 n 14; 130 S Ct 3020; 177 L Ed 2d 894 (2010); *People v Cooks*, 446 Mich 503, 510; 521 NW2d 275 (1994). Michigan’s Constitution maintains the unanimity requirement in criminal trials. Const 1963, art 1, § 14; *Cooks*, 446 Mich at 510-511. Accordingly, Michigan trial courts must “properly instruct the jury regarding the unanimity requirement.” *Cooks*, 446 Mich at 511.

Defendant relies upon *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992) for the proposition that error occurs if “the jury was not instructed that it must unanimously agree on *which* act(s) was proven beyond a reasonable doubt.” However, in *Cooks*, 446 Mich at 512-513, our Supreme Court repudiated *Yarger* and held the following:

[A] specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice.

In this case, the prosecutor presented materially identical evidence revealing that defendant digitally penetrated the victim to support counts 1 and 2. Thus, a general unanimity instruction, which was provided below, was sufficient. The court clearly instructed the jury that defendant was charged with two separate crimes involving digital penetration and one crime involving sexual contact with the victim’s breast. Nothing in the record suggests that the jurors were confused about the factual basis underlying defendant’s convictions. The victim provided detailed testimony regarding two specific instances of digital penetration, one occurring in a bedroom and one occurring on a couch, and one instance of skin-to-skin touching of her breast. Accordingly, the jury instructions did not violate defendant’s right to a unanimous verdict.

III. OFFICER THOMAS’S TESTIMONY

Defendant next contends that Officer Kristin Thomas’s testimony improperly bolstered the victim’s credibility, and that his counsel was ineffective for failing to object. Defendant did

not object to Thomas's testimony at trial, and did not raise his ineffective assistance claim in a motion for a new trial or an evidentiary hearing, so both claims are unpreserved. *Carines*, 460 Mich at 761; *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). We review an unpreserved ineffective assistance claim for mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Generally, it is "improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). In this case, Thomas's testimony did not provide an opinion on the victim's veracity, but rather explained an investigative process. Thomas stated the following: "I spoke with [the victim] . . . briefly, to find out what kind of complaint we had. What the allegations were. Just enough to see if a crime had been committed." Thomas testified that after her conversation with the victim, she decided to move forward with an investigation. Defendant argues that Thomas's testimony that she continued to investigate demonstrated that she believed the victim was telling the truth. However, Thomas's testimony did not affirm that the victim's allegations were true, but rather only indicated that further investigation was warranted. Admittance of Thomas's testimony at trial was not erroneous. Moreover, because counsel cannot be deemed ineffective for failing to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), defendant's claim of ineffective assistance necessarily fails.

IV. SENTENCING DEPARTURE

Finally, defendant argues that the trial court exceeded the sentencing guidelines without proper reason and failed to establish that the departure was proportionate. We review for clear error the reasons cited to support a sentencing departure. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "The conclusion that a reason is objective and verifiable is reviewed as a matter of law." *Id.* We review for an abuse of discretion whether the reasons provided by the trial court were substantial and compelling enough to justify a sentencing departure. *Id.* An abuse of discretion occurs if a defendant's minimum sentence falls outside the range of principled outcomes. *Id.*

The sentencing guidelines are controlled by statute and "a departure is only allowed by the Legislature if there is a 'substantial and compelling reason' for doing so." *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003), quoting MCL 769.34(3). A substantial and compelling reason is "an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *Id.* at 258 (internal quotation marks and citation omitted). A trial court is required to "'justify the particular departure'" in each case where it departs. *Smith*, 482 Mich at 304, quoting *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). In reviewing sentencing departures, we must also consider whether the imposed sentence is proportionate to the crime committed and the defendant's criminal record. *Id.* at 304-305.

In this case, the court cited two reasons to depart upward from the recommended guideline range: (1) exploitation of the victim and (2) the duration and number of sexual acts. Both of these aspects are objectively verifiable as they spring from the facts of the case, and both keenly grab our attention. See *Babcock*, 469 Mich at 258.

First, the trial court concluded that the “guidelines fail[ed] to give proper weight to the exploitation of the victim.” A trial court may not depart from the sentencing guidelines on the basis of facts “already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Exploitation of a victim is considered under offense variable 10 (OV 10), which provides that ten points should be assessed to a defendant’s sentencing score if “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). Defendant was assessed 10 points under OV 10. Although the exploitation of one’s own child is deplorable, the circumstances of exploitation relied upon by the trial court were already accounted for under OV 10. MCL 777.40(1)(b). Accordingly, the lower court clearly erred in anchoring its upward departure on defendant’s exploitation of the victim.¹

However, the trial court properly concluded that the duration and number of offenses in the case at hand constituted a substantial and compelling reason warranting departure. Courts consider the duration and number of offenses for sentencing purposes under OV 13, which is scored for a “continuing pattern of criminal behavior.” MCL 777.43(1). Defendant was assigned 25 points under OV 13. An assessment of 25 points is appropriate if the “offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). The evidence presented at trial established 8 to 10 instances of sexual penetration. Although falling within the open ended range set forth in the statute, the number is significantly higher than the floor. Further, while OV 10 takes into account the existence of a parental relationship, no such distinction is made in OV 13. Therefore, the court identified and adequately explained how OV 13 failed to properly represent the egregiousness of defendant’s pattern of criminal behavior directed at his own daughter. Having considered the record, we are convinced that the court would have departed to the same extent based on this factor alone. See *People v Anderson*, 298 Mich App 178, 191; 825 NW2d 678 (2012).

The particular departure imposed was also proportionate to the crimes defendant committed. A minimum sentence that exceeds the recommended guidelines must “adequately account for the gravity of the offense,” and must be more appropriate to the offender and the offense than a sentence within the guidelines would have been. *Smith*, 482 Mich at 318. In fashioning a minimum sentence, “[t]he court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.” *Id.* Courts may appropriately justify the proportionality of a departure by comparing it against and anchoring it

¹ The prosecutor argues on appeal that OV 10 did not take into account defendant’s suicide attempt following his offenses, which the prosecutor suggests was an effort to manipulate the victim into silence or recantation. However, there is no indication that the court relied upon the suicide attempt in justifying the upward departure. “A reviewing court may not substitute its own reasons for departure . . . [n]or may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.” *Smith*, 482 Mich at 318.

in the sentencing guidelines. *Id.* In doing this, “[t]he trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.” *Id.* Sentencing departures are not subject to “mathematical precision” and therefore a “trial court must comply *reasonably*” in applying the departure standards. *Id.* at 319.

Below, the court reasoned that “the conduct and the injury that occurred here [were] not fully accounted for by the guidelines and it is appropriate, therefore, to exceed the guidelines.” The court observed that its departure was an “advance of one grid” and that it “could go to the Grid 6.” The court thus anchored its departure in the sentencing grid. Further, the court noted that defendant’s sentence was more appropriate in this case because it involved what the court considered to be the “most serious type” of CSC I. Given the circumstances of the criminal acts involved, the court did not abuse its discretion in imposing the upward sentence departure.²

Affirmed.

/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood
/s/ Michael F. Gadola

² We need not reach defendant’s argument that a different judge should preside over resentencing on remand because we affirm defendant’s original sentence.